No. 79

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION No. L. R. 1584 CONSOLIDATED ..... *Petitioners*

v.

FORD, BACON & DAVIS, INCORPORATED ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Your petitioners, applying for a writ of certiorari to the United States Court of Appeals, Eighth Circuit, respectfully show:

STATEMENT OF FACTS

Petitioners filed their complaints for overtime compensation, penalties and attorneys' fees due them under the Fair Labor Standards Act (29 U.S.C.A. s. 201) from respondent. That company had constructed the plant known as the Arkansas Ordnance Plant and thereafter operated it under a cost-plus-a-fixed-fee contract with the United States Government, and it was that plant wherein petitioners were employed (R.3-13).

Respondent filed a motion for summary judgment which in substance alleged that petitioners were not engaged in commerce or in the production of goods for commerce; that petitioners were employees of the United States and, therefore, exempt under the Wage and Hour Law (R.17).

The motion for summary judgment was sustained. The District Court adopted its former opinion in the case of *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, as a basis for its action in sustaining the motion (R.56-58).

The opinion held that "The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence, the United States, in our opinion, was the ultimate consumer thereof within the meaning of the Act and the plaintiff was not engaged in the production of goods for commerce."

The opinion further held that the defendant in making shipments across State lines was performing an administrative act of the Government; that defendant was not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, that plaintiffs were not so engaged and, therefore, not within the coverage of the Act (R.58-79).

Although the issue was not raised by any of the pleadings, was not presented to or considered by the District Court, was not raised in the briefs of the respective parties in the Court of Appeals for the Eighth Circuit, that court in conjunction with the case of *The United States Cartridge Company, a corporation,* v. *R. M. Powell, et al.,* affirmed the ruling of the District Court in sustaining the motion for summary judgment, upon the one ground that petitioners were not covered by the Fair Labor Standards Act but were covered solely by the Walsh-Healey Act (R.7-24).

JURISDICTION

The jurisdiction of the court is invoked under Title 28 U.S.C.A. s. 347 (a). The opinion was rendered April 12, 1949. This application for a writ of certiorari has been made within the time provided for under Title 28 U.S.C.A. s. 350.

QUESTIONS PRESENTED

1. Whether the Walsh-Healey Act, to the exclusion of the Fair Labor Standards Act, controls the creation and the enforcement of claims of employees of an inde-

pendent contractor with the United States Government for overtime compensation while engaged in the production of goods which were later shipped out of the State to another State.

2. Whether a "cost-plus-a-fixed-fee" contractor with the Government manufacturing goods under such contract, the raw materials of which are shipped to such contractor from without a state and the ultimate products manufactured are shipped without the state, is engaged in "commerce" within the meaning of the Fair Labor Standards Act.

3. Whether a "cost-plus-a-fixed-fee" contractor with the Government, a private corporation, wherein the Government is the owner of the raw materials shipped to such contractor from without the state, and the Government is the owner of the finished products shipped without the state, is a governmental agency exempt from the operation of the Fair Labor Standards Act.

4. Whether the respondent is engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

5. Whether the United States Government, owning plant facilities, raw materials prior to processing and after processing, which materials were processed by a "cost-plus-a-fixed-fee" contractor with the Government and subsequently shipped without the state for use in the prosecution of the war, is a producer and the ultimate consumer of such goods within the meaning of the Fair Labor Standards Act.

6. Whether the United States Government is the employer and is exempt from the operation of the Fair Labor Standards Act under the facts of this case.

7. Whether your petitioners were actually employees of the respondent.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The questions presented in this cause are of special and outstanding importance for the reason that the goods produced herein were manufactured by a cost-plus-a-fixed-fee contractor with the United States Government under similar conditions to goods produced by many other such contractors which involved many necessary items and products transported in commerce essential to the prosecution of the war, and which production of similar goods has been uniformly held subject to the Fair Labor Standards Act. Many other like cases are being held by District Courts awaiting a decision of this Court upon the vital issues involved.

2. The decision sought to be reviewed is in conflict with the holdings of the Courts of Appeal for the Sixth, Seventh and Ninth Circuits, wherein it was held that employees of a cost-plus-a-fixed-fee contractor with the United States Government are under the coverage of the Fair Labor Standards Act, whereas the decision of the Eighth Circuit held that such employees are not covered by that Act but were covered exclusively by the terms of the Walsh-Healey Act.

3. The opinion of the Court of Appeals for the Eighth Circuit is in conflict with the decisions of this Court in holding that a "cost-plus-a-fixed-fee" contractor is a mere agency of the United States Government. *Alabama* v. *King & Boozer*, 314 U. S. 1; *Buckstaff* v. *McKinley*, 308 U. S. 358; *Curry* v. *United States*, 314 U. S. 14; *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 361.

4. Petitioners were entitled to the benefits of the Fair Labor Standards Act while working for the "cost-plus-a-fixed-fee" contractor, respondent.

5. The said decision sought to be reviewed has decided important questions of Federal law which have not been, but should be, settled by this Court.

6. The said decision has decided directly one question, and inferentially other questions, in a way probably in conflict with applicable decisions by this Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in case No. 13,660, entitled on its docket "Julia Rhoda Aaron and all other plaintiffs and interveners listed in the complaints and interventions in the District Court in Civil Action No. L. R. 1584 consolidated, appellants, vs. Ford, Bacon & Davis, Incorporated, appellee", and that upon a full hearing of said cause, said judgment of said Court of

Appeals for the Eighth Circuit be reversed, and that your petitioners have such other and further relief as the Court may deem proper.

Respectfully submitted

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SUPPORTING BRIEF

The opinion of the United States Court of Appeals for the Eighth Circuit in this cause, as well as its opinion in *The United States Cartridge Company, a corporation, v. R. M. Powell, et al.*, upon which the Court based its opinion in the former case, will be found in the printed record (R.7-33).

STATEMENT OF THE CASE

We adopt the statement of the case as set forth in the preceding petition and do not re-state it here.

The questions presented in our petition (with the exception of the applicability of the Walsh-Healey Act) were

raised before this Court in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249. None of those questions was determined by this Court, but the cause was remanded to the District Court for the purpose of enlargement and amplification of the record.

We believe the record here is complete for consideration of the applicability of the Walsh-Healey Act as well as the other questions presented.

ARGUMENT

1. There have been numerous cases before the courts, both Federal and State, involving the applicability of the Fair Labor Standards Act. See list of such citations on p. 18 of the opinion of the Court in *The United States Cartridge Co., a corporation,* v. *R. M. Powell, et al.*

In none of the cited cases has any court held that the Walsh-Healey Act covers the employment of workmen by a contractor under a cost-plus-a-fixed-fee contract with the United States Government to the exclusion of the Fair Labor Standards Act. The decision sought to be reviewed holds that the Walsh-Healey Act, though not raised or considered by the trial court, related to the jurisdiction of the court and was properly before it. The same thing was true in *Kennedy* v. *Silas Mason, supra.* This Court evidently did not view the issues in the *Kennedy* case as did the Court of Appeals for the Eighth Circuit in its decision, for this Court could have determined the *Kennedy* case by a like holding, and thereby have finally disposed of that and similar litigation if it is true the Walsh-

Healey Act controls to the exclusion of the Fair Labor Standards Act.

"If we are correct in our contention that the Walsh-Healey Act does not control in this cause, then the following argument becomes pertinent in the consideration of the issues raised in this proceeding:

2. By the express terms of the contract between respondent and the Government, the petitioners were denominated and classified as employees of respondent, not of the United States (R.28). All of the detailed supervision over them as to their general conduct, the manner and method of performing their duties and general behavior was exercised by the respondent. The only supervision by the United States was indirectly to insure that the funds advanced by the Government were disbursed according to law. Under like circumstances the employees have been held to be employees of the contractor. *Alabama v. King & Boozer, supra; Bell v. Porter*, 159 F. 2d 117; *Carey v. U. S., supra; U. S. v. Driscoll*, 96 U. S. 421; *Walling v. Hailey Gold Mines*, 136 F. 2d 102.

3. The United States Government and the respondent, in a formal contract executed by them, specifically provided that the respondent should have all of the rights, responsibilities, and duties of an independent contractor. The supervision exercised by the Government was of a general nature usually exercised in cost-plus-a-fixed-fee contracts of this kind. This Court has consistently held that the contractor under similar circumstances is not an agent of the Government, but an independent contractor. *Alabama v. King & Boozer, supra; Baltimore & A. R. Co. v. Lichtenberg*, 308 U. S. 525; *James v. Dravo Construc*

tion Co., 302 U. S. 134; *Penn Dairies* v. *Milk Control Commission*, *supra*; *U. S.* v. *Driscoll*, *supra*.

4. Numerous decisions have defined commerce and what is meant by "production of goods for commerce" within the meaning of the Fair Labor Standards Act. The criterion adopted by the Circuit Court of Appeals, Seventh Circuit, in *Bell* v. *Porter*, *supra*, was the crossing of State lines. There can be no distinction between the production of munitions on the one hand and trucks on the other hand. Medical supplies and food are equally necessary to the winning of a war. No decision has attempted to state the reasons why medical supplies and food should be covered by the Fair Labor Standards Act and at the same time exclude munitions of war, when both are to be devoted to use by the Government to winning a war. *Alabama* v. *King & Boozer*, *supra*; *Atlantis Co.* v. *Walling*, 131 F. 2d 518; *Bell* v. *Porter*, *supra*; *Bowie* v. *Gonzales*, 117 F. 2d 11; *Clyde* v. *Broderick*, 144 F. 2d 348; *Fox* v. *Summit King Mines*, 143 F. 2d 926; *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572; *Rutherford Food Corporation* v. *McComb*, 331 U. S. 722; *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100.

5. There is almost conclusive evidence that Congress intended the Act to apply to goods produced for transportation by the United States to be found in the subsequent legislative history in which Congress recognized that the Fair Labor Standards Act applied to workers employed in plants producing armaments and other vital war materials for the Government. Both the offer and

the rejection of various amendments designed to exempt such workers from the Act were predicated on the premise that they were within the existing coverage provisions. Some eighteen bills were introduced for the purpose of suspending or restricting the overtime provisions of the Act for the war's duration. Such amendments would have been largely unnecessary had the existing Act not applied to workers producing war goods for the Government. By their rejection Congress clearly indicated its desire that the Act continue to be applied to employees engaged in these activities. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414; *Alabama* v. *King & Boozer*, *supra*.

6. In the production of goods at the Arkansas Ordnance Plant the items produced were components which were required to be shipped to other establishments in other States for further processing or assembly before coming to rest as a finished article ready to be delivered for ultimate consumption. The work performed by the petitioners herein was merely one process in several processes and under no consideration could it be said that the goods produced or worked on by the petitioners were delivered to the ultimate consumer within the meaning of the Fair Labor Standards Act. The same cases referred to under the other preceding three points are applicable under this point, as well as the following additional authorities: *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165; *Santa Cruz Fruit Packing Co.* v. *W.R.B.*, 303 U. S. 453; *Warren Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *W.R.B.* v. *Jones & Laughlin*, 301 U. S. 1.

We believe the petition should be granted and, upon a full hearing, the cause should be reversed.

Respectfully submitted

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